[COUNSEL LISTED ON SIGNATURE PAGE]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA–SAN JOSE DIVISION

In re ACACIA MEDIA TECHNOLOGIES CORPORATION	Case No. C-05-01114 JW **MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF DEFENDANTS' MOTION TO CONTINUE HEARING DATE (CIVIL L.R. 7-11)** Judge: Honorable James Ware

Dockets.Justia.com

MOTION FOR LEAVE TO FILE REPLY

Defendants[1] request leave to file the following reply in support of their Motion to Continue Hearing Date [Doc. No. 304]. A brief reply is appropriate because Acacia's opposition not only addressed the hearing date, but also endeavored to re-argue its case-management proposal that the Court previously rejected.

PROPOSED REPLY

Acacia concedes in its opposition that it filed its summary-judgment motion to try to prevent this Court from deciding defendants' pending motions under § 112—motions that the Court expressly ruled that defendants should bring. Acacia did not, however, ask the Court directly to reconsider its decision to hear those motions. Acacia did not request permission to move for reconsideration, as Civil L.R. 7-9(a) requires. It did not cite any change in the law or the facts, nor any alleged "manifest failure by the Court to consider material facts or dispositive legal arguments," which are the only bases for reconsideration. *See* Civil L.R. 7-9(b). Indeed, Acacia did not even alert the Court that it was seeking to undo the Court's ruling.

Instead, without prior notice or approval, Acacia filed its own summary-judgment motion and set an earlier hearing date than defendants' motions. As Acacia's opposition concedes, if the Court grants its motion now, Acacia will then argue that the Court has been stripped of jurisdiction to decide defendants' pending motions. In other words, after Acacia presented sixteen pages of briefing and received a full hearing on its proposed plan, and lost, Acacia decided to try to force its plan on the parties and the Court as a *fait accompli*.

The Court should reject these tactics. Acacia has done more than violate the letter of the

[1] The following defendants join this motion: Comcast Cable Communications, LLC; Insight Communications, Inc.; The DirecTV Group, Inc.; Echostar Satellite LLC; Echostar Technolgies Corp.; Coxcom, Inc.; Hospitality Network, Inc.; Cable America Corp.; Charter Communications, Inc.; Wide Open West Ohio LLC; Armstrong Group; Massilon Cable TV, Inc.; East Cleveland Cable TV and Communications LLC; Mid-Continent Media, Inc.; Cannon Valley Communications, Inc.; US Cable Holdings, LP; Arvig Communications Systems; Sjoberg's Cablevision, Inc.; Cablevision, Inc.; Loretel Cablevision, Inc.; NPG Cable, Inc.; Block Communications, Inc.; Savage Communications, Inc.; Mediacom Communications Corp.; Cequel III Communications I, LLC (d/b/a Cebridge Connections); Cable One, Inc.; Bresnan Communications; Time Warner Cable, Inc.; and CSC Holdings, Inc.

rules governing reconsideration. It has attempted to take matters into its own hands and engineer its own reconsideration, by imposing the case plan that the Court fully considered, and—for exceedingly good reasons—rejected. The Court should nip Acacia's effort in the bud, and reset the hearing on Acacia's summary-judgment motion to coincide with the hearing on defendants' pending motions, once that date is set.

Moreover, even if the Court considered Acacia's complaints in its opposition, Acacia's arguments still fall flat. First, as defendants have already fully briefed, proceeding as Acacia suggests would be *vastly* less efficient than the plan the Court adopted. The Court's rulings establish multiple grounds for invalidity under § 112 as a matter of law, but Acacia has refused to stipulate to most of them. [*See, e.g.,* Doc. No. 292 (Motion for Summary Judgment), laying out numerous reasons that the Court's rulings have rendered the patents invalid under § 112 as a matter of law.] Indeed, the consequences of the Court's rulings were clear after the Court issued its Sixth Claim Construction Order, when Acacia initially *agreed* that the Court should decide all the § 112 issues before any appeal. [*See* Doc. No. 267 at 2:12-17; Doc. No. 264-2 at pp. 12-13.] Only later did Acacia seize on the strategy of presenting the § 112 issues to the Federal Circuit in piecemeal appeals, with Acacia hand-selecting the ones that it will present first.

What's more, before *any* appeal of the merits could occur under Acacia's scheme, the parties would first need to litigate whether this Court is in fact stripped of jurisdiction to decide defendants' pending motions if it grants Acacia's motion first, as Acacia wrongly contends.[2] Resolving that issue alone would inject many months of delay. It is far more expeditious and efficient to bypass that dispute entirely, and decide all the § 112 issues together, then present a complete package to the Federal Circuit—just as the Court already ruled it would do.

Acacia's other arguments are equally meritless. The departure of the Court's technical advisor, Dr. Schulz, has no relevance to this question. The Court is exceedingly well versed in

[2] *Jang v. Boston Scientific Corp.*, 532 F.3d 1330 (Fed. Cir. 2008), cited by Acacia in its opposition, provides no support whatsoever for Acacia's position. In *Jang*, the Federal Circuit merely remanded to the district court to identify which of its claim constructions formed the basis of a stipulated judgment, so it did not need to review all the claim constructions. *Id.* at 1336. It has no bearing here at all.

these issues. Should it need any further technical assistance, it can readily obtain it. Further, defendants would be *substantially* prejudiced if Acacia is allowed to carry out its plan. They will be forced to litigate the jurisdictional issue before their already pending motions can be decided. And should Acacia somehow prevail on that issue, they will be denied the opportunity to raise on appeal grounds for invalidity that are already established as a matter of law by the Court's rulings. Acacia, on the other hand, will suffer *no* prejudice if the Court decides all the pending motions together, readying the case for a prompt appeal.

For these and other very good reasons, after fully considering Acacia's arguments, the Court already ruled that defendants should bring their § 112 motions, and defendants have done so. Acacia has now tried to take matters into its own hands and prevent the Court from deciding those motions. For the reasons set forth above, the Court should continue the hearing date on Acacia's motion, and set it to coincide with the hearing on defendants' motions, once that date is set.

Respectfully submitted,

Dated: October 3, 2008

DARALYN J. DURIE (CA SBN 169825)
DAVID J. SILBERT (CA SBN 173128)
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, CA 94111-1704

By /s/ David J. Silbert
David J. Silbert
Attorneys for Defendants
COMCAST CABLE COMMUNICATIONS, LLC, and INSIGHT COMMUNICATIONS, INC.

Dated: October 3, 2008

VICTOR G. SAVIKAS (CA SBN 145658)
KEVIN G. McBRIDE (CA SBN 195866)
LOUIS TOUTON (CA SBN 102380)
MARSHA E. MULLIN (CA SBN 93709)
JAMES E. GLORE (CA SBN 215933)
JONES DAY

555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071

By /s/ Kevin McBride
Kevin McBride
Attorneys for Defendant
THE DIRECTV GROUP, INC.

Dated: October 3, 2008

HAROLD J. McELHINNY (CA SBN 66781)
RACHEL KREVANS (CA SBN 116421)
MATTHEW I. KREEGER (CA SBN 153793)
JASON A. CROTTY (CA SBN 196036)
DAVID M. HYMAS (CA SBN 226202)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482

By /s/ Matthew I. Kreeger
Matthew I. Kreeger
Attorneys for Defendants
ECHOSTAR SATELLITE LLC and ECHOSTAR TECHNOLOGIES CORPORATION

Dated: October 3, 2008

ANNAMARIE A. DALEY (*pro hac vice*)
ROBINS, KAPLAN, MILLER & CIRESI LLP
2800 LaSalle Plaza, 800 LaSalle Avenue
Minneapolis, Minnesota 55402

RICHARD R. PATCH (CA SBN 88049)
J. TIMOTHY NARDELL (CA SBN 184444)
COBLENTZ, PATCH, DUFFY & BASS, LLP
One Ferry Building, Suite 200
San Francisco, California 94111-4213

By Annamarie A. Daley
Annamarie A. Daley
Attorneys for Defendants
COXCOM, INC., HOSPITALITY NETWORK, INC., and CABLE AMERICA CORPORATION

Dated: October 3, 2008

BRADFORD LYERLA (*pro hac vice*)
KEVIN HOGG (*pro hac vice*)
JEFFREY DEAN (*pro hac vice*)
MARSHALL, GERSTEIN & BORUN LLP
6300 Sears Tower
233 South Wacker Drive

Chicago, Illinois 60606-6357

MORGAN W. TOVEY (CA SBN 136242)
WILLIAM R. OVEREND (CA SBN 180209)
REED SMITH LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111

By /s/ Jeffrey Dean
Jeffrey Dean
Attorneys for Defendants
CHARTER COMMUNICATIONS, INC., WIDE OPEN WEST OHIO LLC, ARMSTRONG GROUP, MASSILON CABLE TV, INC., EAST CLEVELAND CABLE TV AND COMMUNICATIONS LLC, MID-CONTINENT MEDIA, INC., CANNON VALLEY COMMUNICATIONS, INC., US CABLE HOLDINGS, LP, ARVIG COMMUNICATIONS SYSTEMS, SJOBERG'S CABLEVISION, INC., LORETEL CABLEVISION, INC., NPG CABLE, INC., BLOCK COMMUNICATIONS, INC.; SAVAGE COMMUNICATIONS, INC.

DATED: October 3, 2008

MITCHELL D. LUKIN
BAKER BOTTS LLP
One Shell Plaza
910 Louisiana
Houston, Texas 77022

JEFFREY D. SULLIVAN
BAKER BOTTS LLP
30 Rockefeller Plaza
New York, New York 10112

STEPHEN E. TAYLOR
TAYLOR & CO. LAW OFFICES, INC.
One Ferry Building, Suite 355
San Francisco, California 94111

By /s/ Mitchell D. Lukin
Mitchell D. Lukin
Attorneys for Defendants
MEDIACOM COMMUNICATIONS CORPORATION, and CEQUEL III COMMUNICATIONS I, LLC (d/b/a CEBRIDGE CONNECTIONS)

DATED: October 3, 2008

MITCHELL D. LUKIN
BAKER BOTTS LLP

One Shell Plaza
910 Louisiana
Houston, Texas 77022

JEFFREY D. SULLIVAN
BAKER BOTTS LLP
30 Rockefeller Plaza
New York, New York 10112

By /s/ Mitchell D. Lukin
Mitchell D. Lukin
Attorneys for Defendants
CABLE ONE, INC., and BRESNAN COMMUNICATIONS

DATED: October 3, 2008

DAVID S. BENYACAR
DANIEL REISNER
KAYE SCHOLER, LLP
425 Park Avenue
New York, N.Y. 10022-3598

By /s/ David S. Benyacar
David S. Benyacar
Attorneys for Defendant
TIME WARNER CABLE, INC.

DATED: October 3, 2008

BENJAMIN HERSHKOWITZ
GIBSON, DUNN & CRUTCHER
200 Park Avenue
New York, N.Y. 10166-0193

By /s/ Benjamin Herskowitz
Benjamin Hershkowitz
Attorneys for Defendant
CSC HOLDINGS, INC.